



DOCKET

02-REN-1038

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August 11, 2011

California Energy Commission
1516 Ninth Street, MS-34
Sacramento, CA 95814

Dear Commissioners:

Re: DOCKET No. 02-REN-1038
Staff Workshop on Possible Changes to the Emerging Renewables Program Guidebook
Comments of Alteryg Systems, a California corporation

There is an old adage in jurisprudence that, “Hard facts make bad law.” This means that, when a court or agency tries to establish a precedent or amend a regulatory scheme to right a wrong committed by a particularly unsympathetic party, the “solution” is often a good intentioned, but bad, regulatory scheme that harms other legitimate program participants and contravenes the original goals of the legislation. The agency’s good intentions in dealing with “hard facts” end up creating “bad law.”

It would be difficult to envision a more dramatic example of that principle than the effect the Commission’s proposed amendments to the Emerging Renewables Program (“ERP”) would have on Alteryg Systems (“Alteryg”) and the tier one national telecommunications carrier whose name has been disclosed to the Commission staff under confidentiality (the “Customer”). Relying on the ERP guidelines, Alteryg and the Customer began, more than two years ago, negotiating a large (\$172 million) purchase order for fuel cell systems to provide clean power to the Customer’s wireless cell towers throughout California (the “California Deployment”). Both Alteryg and the Customer spent hundreds of thousands of dollars and diverted considerable manpower toward this project. The parties performed site surveys, completed site walks, gathered utility bills, compiled documentation, developed a commercial supply of renewable hydrogen, negotiated hydrogen contracts, configured hardware, negotiated pricing with component suppliers and service providers, and located and retained contractors. A total of 2,489 California Deployment sites within participating utility districts were identified, and purchase prices were negotiated. The sale is contingent upon the \$3.00 per watt rebate being available for the California Deployment.

On March 4, 2011, just as Alteryg and the Customer were preparing to file the 2,489 individual R-1 applications this single purchase and deployment required, the Commission suspended the ERP to address abuses by certain wind system retailers. The Commission has proposed for comments a Draft Guidebook which may revise the ERP. Certain of those proposals – the 50% limit and the 20-application-at-a-time limit -- could cause this California Deployment to be cancelled. It would be grossly unfair to Alteryg and the Customer to change the rules on Alteryg and the Customer with regard to this particular contract.

Here, the Commission is pursuing two good intentioned goals – (i) preventing future rogue wind system retailers from abusing the ERP by taking money to which they might not be entitled, and (ii) as part of that first goal (and similar perceived abuses of the SGIP), preventing any future applicant from reserving all of the ERP funds at any one time. However, the Commission’s proposed “solution” would be “bad law” and actually contrary to the legislature’s goals in adopting the ERP. The proposed revisions could in fact:

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- Contravene the legislative goals of the ERP;
- Cause an existing Customer (willing to invest large sums of money into the California economy) to cancel an order for the largest single deployment of fuel cell systems in the world, ever;
- Prevent the State from obtaining the economic and social benefits of that monumental deployment;
- Cause crippling damage to Alteryg, the most promising fuel cell innovator on the planet (and a California corporation by the way); and
- Destroy the State's best chance to date of establishing an independent and commercially viable renewable technology industry in this State.

The State would recognize significant immediate positive impacts from this sale:

- The State would receive **\$15 million in Sales Tax revenue** (at 8.75%) **plus \$5.3 million in income tax revenues** (at 7%).
- **\$687 million would be injected into the California economy** (using a 4:1 multiplier).
- **1,251 skilled jobs would be created** (fabrication, assembly, site surveying, construction, installation, electricians).
- **Air emissions would be reduced** (replacing diesel generators) to meet CARB requirements: eliminate 1,373 tonnes of CO₂ emissions, 9.15 tonnes of CO, 8.58 tonnes of NMHC+Nox and 45 tonnes of PM per year.
- **Emergency responsiveness would be improved** for the State's Office of Emergency Services and the Federal Government's Department of Homeland.

Alteryg respectfully requests that the Commission amend its proposed Draft Guidebook as follows:

1. **THE PENDING PURCHASE ORDER FOR THE CALIFORNIA DEPLOYMENT BY ALTERGY'S CUSTOMER SHOULD BE APPROVED UNDER THE GUIDELINES EXISTING PRIOR TO THE SUSPENSION.**

When the Commission suspended the ERP on March 4, it acknowledged that it did not want to negatively impact sales that were in the negotiation phase before the suspension, and that were contingent on the customer obtaining \$3.00 per watt rebates. Thus, the Commission indicated that rebate levels for wind energy systems would remain at \$3.00 per watt for a period of 30 days after the suspension is lifted.

“To avoid affecting any pending negotiations or potential sales that are contingent on the higher rebate level of \$3.00 per watt, the Energy Commission intends to extend the \$3.00 per watt rebate level for approximately 30 days after the suspension is lifted” (Temporary Suspension Notice, Mar. 4, 2011)(emphasis added).

The purchase by Alteryg's Customer of fuel cell systems for the California Deployment falls squarely within that acknowledgment. As mentioned above, Alteryg and its Customer spent approximately two years negotiating what would be the largest deployment of fuel cells anywhere, ever -- \$172 million of clean, renewable hydrogen fuel cells to be deployed right here in California. That California Deployment is contingent on the Customer obtaining \$3.00 per watt rebates for the 2,489 systems that would be deployed. Until the suspension, which came as a complete surprise to the Customer and Alteryg, the availability of those rebates was not an issue. The parties reasonably assumed

the rebates would be available, and they negotiated the contract, spent money and deployed resources in preparation for the California Deployment, all in good faith reliance on the rules of the ERP. That program should not now be changed to our detriment without a notice period. Fairness and justice require that, if any changes are made to the ERP, the ERP as it existed at the time of suspension, should apply to any fuel cell system applications filed by the Customer as part of this California Deployment within some reasonable period of time (say 30 days) after the new guidebook is adopted. This would be fair both to Alteryg and its Customer, and consistent with the goals of the ERP. As discussed above, the State also would recognize significant positive social and economic impacts:

While we recognize that the \$3.00 per watt rebate amount is not being changed for fuel cells under the Draft Guidebook (as it is for wind systems), as we discuss below the introduction of the 50% limit also being proposed would have the same practical effect. It would result in Alteryg's Customer receiving less than the full \$3.00 per watt rebate under the pricing that was negotiated. The contract, and this very desirable California Deployment, therefore would be cancellable.

2. REGARDING PERCENTAGE CAPS, THE COMMISSION SHOULD ADOPT A SLIDING SCALE STARTING AT 75%.

The express purpose of the ERP is to provide short-term incentives for innovative renewable energy companies, with the expectation that they will improve distribution and drive down costs so that they ultimately will be viable without rebates. The ultimate goal is a vibrant renewable energy industry in California populated by the best innovators, not a State littered with high-cost manufacturers who forever will be reliant on government subsidies. The ERP should therefore act to reward, not punish, the best and most efficient companies who are driving down costs and making technological innovations.

Alteryg has made a major breakthrough in fuel cell technology that allows it to produce fuel cells more efficiently and at lower cost than its competitors. In the last two years alone, Alteryg has reduced its fuel cell cost by more than 38%. This is great news for customers and will help expand the use of fuel cells (as evidenced by the California Deployment and other large orders Alteryg has recently received for deployments in California). However, despite these cost reductions, rebates are still critical, in the near term, to allow fuel cells to compete with diesel generators and batteries.

The proposed 50% limit unfairly penalizes the most efficient fuel cell companies. In particular **it would penalize Alteryg, the lowest cost fuel cell manufacturer, and the only California-domiciled fuel cell manufacturer that is certified under the ERP.** For example, under pricing negotiated with the Customer prior to the suspension, the full rebate amount could total 76% of the net purchase price if the Customer reaches volume purchases milestones. A short-term 75% limit would allow Alteryg and its Customer to get closer to the original rebate amount that is the subject of their contract that was negotiated before the suspension took place.

Alteryg suggests that the proposed cap on rebate amounts should be raised from 50% of the net purchase price of the system to a sliding scale starting at 75% of the net purchase price of the system, and then declining over time as follows.

2011-2012: 75% of the net purchase price.
2013: 70% of the net purchase price;
2014: 60% of the net purchase price

2015: 50% of the net purchase price.

Fuel cells are at a much earlier stage in their life cycle (as evidenced by the number of fuel cells deployed versus solar) than solar, wind and others and need time to be commercially ready for rebate limits to be placed on their deployments. Otherwise, customers will divert purchases to less environmentally friendly technologies (diesel generators and lead acid batteries).

3. THE COMMISSION SHOULD ADOPT AN ADDITIONAL INCENTIVE OF 20 PERCENT FOR THE INSTALLATION OF ELIGIBLE EMERGING RENEWABLE TECHNOLOGIES FROM A CALIFORNIA SUPPLIER.

The Commission should adopt a benefit for California suppliers under the ERP much like the additional incentive adopted under the SGIP program, wherein an additional 20% rebate is offered for California suppliers. This would encourage the establishment of a California manufacturing base for emerging renewable technologies and also recognize the benefit, to California, of having such facilities located here, and employing California residents to work and pay taxes within the State.

4. THE PROPOSED PROVISION THAT NO SINGLE RETAILER MAY HAVE MORE THAN 20 APPLICATIONS SUBMITTED AT A SINGLE POINT IN TIME SHOULD BE CHANGED.

The Draft Guidebook provides, in Section III.E, page 13, as follows:

“E. Limits on Number of Rebate Applications Allowed at Once.

In order to mitigate delays and efficiently process applications, no single retailer may have more than 20 rebate applications, as represented by the CEC-1038-R1 form, submitted to the Energy Commission at a single point in time. Once a retailer has reached its 20 application limit, additional rebate reservation applications for that retailer will only be accepted once a CEC-1038-R2 form has been issued for a reservation already received.”

We respectfully submit that this provision should be changed. First, it is difficult to understand how this provision really would “mitigate delays” or “efficiently process applications.” However, even if true, administrative efficiencies should not trump the primary goals of the legislation, which is to promote an economically viable fuel cell industry.

The proposed provision instead should be changed to provide some mechanism similar to that allowed solar systems that are sold as part of a larger (multi-home) real estate development. It is our understanding that the larger project as a whole is approved and funds are drawn from the program as homes are sold. Similarly, in the fuel cell industry, large corporate customers (after long and complex internal procurement processes and capital expenditure approvals) make multi-system sales that are interrelated (i.e., the individual sales cannot be made unless the larger project is approved).

Alternatively, the proposed revision should be amended to provide that “no single payee may file more than 50 applications per week.” While the Commission currently states that it can process applications within three to five days, there is no time limit placed on the Commission. Thus, customers could be “on hold” for an extended length of time, perhaps years if you consider a 2,500 or 5,000 unit order. Given the nature of fuel cell customers, their complex procurement processes and their need to assure that their cell towers have power when needed, the 20-application limit would typically result in

cancellation of purchases, thus **suppressing rather than encouraging adoption of fuel cell systems** in California in contravention of the ERP goals.

The proposed provision ignores the commercial reality of how fuel cells are marketed and distributed. Fuel cells are different from wind systems. They are different technologies that are capitalized, marketed and sold differently. Unlike solar or wind companies who may sell through scores (or hundreds) of retailers statewide, fuel cell manufacturers typically either sell directly to the customer, or they sell through one single distributor who stocks and services the fuel cell systems statewide.¹ Fuel cell customers have complex procurement and capital request processes that may take up to two years for capital expenditure approvals and, once approved, certainty is needed that the applications will be approved. Otherwise, the customer will simply purchase available “dirty” technologies (diesel generators and lead acid batteries), because customers need to assure that their cell towers have power.

In addition, fuel cell customers often purchase in large volumes. Manufacturers like Alteryg in turn need to make purchases of hardware components in large volumes. Pricing is often influenced substantially by volume pricing commitments. Thus, fuel cell manufacturers like Alteryg need to commit to purchase large volumes of components from their suppliers, otherwise we will not be able to achieve pricing levels needed to meet customer pricing demands. No supplier will supply materials based on just a 20-unit order of materials. The pricing that Alteryg must establish in order to win contracts would simply not work if it is required to order build, deliver and install 20 sites (applications) at a time. Therefore, this provision, as a practical matter, would prevent the California Deployment and other similar sales from being made. The fuel cell industry simply would wither and die in California if this provision is imposed.

We also respectfully submit that it is neither the goal of the ERP, nor in turn the charter of the Commission in administering the ERP, to assure some perceived level of “competition” **among fuel cell sellers themselves**. Rather, the goal of the legislation is to increase competition **between fuel cell sellers and sellers of “dirty” incumbent technologies** (diesel generators and lead acid batteries) by providing rebates that would help, in the short term, bridge the cost gap between fuel cells and those less desirable incumbent technologies. **The Commission can help the legislature realize this goal by facilitating sales** of renewable energy systems that supply on-site electricity needs across California.

“The goal of the ERP is to reduce the net cost of on-site renewable systems to end-users, and thereby stimulate demand and increased sales of such systems. Increased sales are expected to encourage manufacturers, sellers and installers to expand operations, improve distribution, and reduce system costs” (ERP Guidebook, p. 1).

Among fuel cell sellers themselves, the ERP requires only an **equality of opportunity** for each fuel cell manufacturer to sell fuel cell systems in this State. That goal is accomplished by getting program funds into the economy and encouraging legitimate customers to purchase and deploy fuel cell systems. That goal is achieved whether the emerging renewables products are purchased from one manufacturer or from several. It was never the goal of the ERP to assure **equality of result** among various fuel cell

¹ There are only three eligible fuel cell manufacturers certified under the ERP -- Alteryg, ReliOn and IdaTech. UTC and Fuel Cell Energy were certified before the 30kW limit was incorporated into the guidebook and therefore do not qualify under the current program.

manufacturers, or to assure that the less efficient technologies or manufacturers would have funds reserved for them if and when they ever applied.

If California wants to maintain its position as a leader in renewable energy technologies, and as a State where innovative clean technology companies can take hold, Alteryg is precisely the type of California-based company, its Customer is precisely the type of customer, and the California Deployment is precisely the type of fuel cell adoption, that California and the ERP, should encourage and nurture.

We respectfully request that Alteryg's requested changes to the Draft Guidebook be adopted. This request is made on the grounds that these changes would be fair to Alteryg and its Customer, good for California, and consistent with the goals of the ERP. Failure to adopt these changes would impede realization of the ERP goals for the fuel cell industry, punish our company and other fuel cell companies financially, divert customers to more environmentally damaging solutions, and negatively impact the economy of this State at a time when stimulus is needed badly.

Respectfully submitted,

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